Countryman, Ryan

From:	Tom McCormick <tommccormick@mac.com>
Sent:	Friday, December 20, 2019 7:38 AM
To:	Mock, Barb
Cc:	McCrary, Mike; Countryman, Ryan; Dobesh, Michael; MacCready, Paul; Otten, Matthew; Julie Ainsworth-Taylor
Subject:	Comments on BSRE's brief filed Dec 12 -- 30.34A.040(1) issues

Director Mock:

SCC 30.34A.040(1) provides that an additional 90 feet of building height may be approved "when the additional height is documented to be necessary or desirable when the project is located near a high capacity transit route or station."

I.

In the brief that BSRE filed on Dec. 12, 2019, in the Court of Appeals, BSRE argues that Point Wells is located near a high capacity transit route, so it satisfies SCC 30.34A.040(1)'s high capacity transit requirement. The Hearing Examiner and the County Council previously rejected that argument, concluding that mere proximity to a route was insufficient, and that *access* to high capacity transit was required too.

BSRE argues (again) that SCC 30.34A.040(1) provides "two alternatives for high capacity transit -- the project must be located either near a high capacity transit route or a high capacity transit station," and:

> ***"The only reading*** of this statute which does not render a portion of the statute "meaningless and superfluous" is that which recognizes both options: (1) proximity to a high capacity transit route; or (2) proximity to a high capacity transit station." (emphasis added)

BSRE is wrong of course. Its "only reading of this statute" is a wishful reading only. It's time (again) for a reality check. There are two obvious and elementary reasons why BSRE is wrong.

First, BSRE's "only reading" of the statute, premised on the nutty assumption that a bus route is not a "transit route," does not avoid rendering a portion of the statute "meaningless and superfluous." It actually does just the opposite, rendering a portion of the statute (the word "station") "meaningless and superfluous." A high capacity transit station is always located on a high capacity transit route (e.g., the Edmonds train station is located on Sounder's Everett-Seattle route). If one deleted the word "station" from SCC 30.34A.040(1), there would be no consequence under BSRE's "only reading." That is, BSRE's "only reading" renders the word "station" meaningless and superfluous. All stations are located on routes, so under BSRE's "only reading," the word "station" adds nothing. The word "route" alone would do all the necessary work. The word "station" becomes superfluous, violating a basic canon of statutory construction.

Second, BSRE is wrong because it's "only reading" is obviously not the only reading. In BSRE's alternate-reality world, a transit route means a train route only. It refuses to accept that a "transit route" includes the most obvious of all: a bus route. It refuses to acknowledge the obvious because if it does so, its "only reading" fails,

and the curtain rises on the correct reading of SCC 30.34A.040(1), where both the words "route" and "station" have meaning and are not superfluous — a "project is located near a high capacity transit route or station" when it is located near either: (1) a high capacity bus route; or (2) a train station or light rail station.

As Ryan Countryman testified at the May 22, 2018 hearing (transcript page 8):

> "Q: Would being on a Swift Bus route be consistent with SCC 30.34A.040[(1)] because there are bus stops on the route?
> A. Yes.
> Q. Okay. So the discussion yesterday on cross, whether or not there's -- "on the route" has a meaning, it does have a meaning in the context of bus rapid transit which is part of high capacity transit; is that correct?
> A. That's correct.
> Q. Okay. Has the applicant proposed meeting the high capacity transit requirement with bus rapid transit?
> A. No, they have not."

BSRE's contorted "only reading" fails on statutory construction grounds (it renders the word "station" superfluous). Further, BSRE's contorted "only reading" fails to recognize and accept that the phrase "high capacity transit route" includes a bus rapid transit route.

BSRE's contorted "only reading" reading that it is sufficient for a project to be located near train tracks with no access point is just plain ridiculous, and must be rejected (again).

II.

BSRE also argues that the Hearing Examiner prematurely ruled that the additional height is not "necessary or desirable," because the parties were not given a chance to brief the subject.

If given the chance, BSRE would likely argue that the additional height is "necessary" to comply with the minimum FAR requirement.

I debunked that notion in my Dec. 17, 2019, email to you.

BSRE cannot successfully claim that the minimum FAR requirement makes it necessary to have buildings taller than 90 feet, when there are ways to satisfy the requirement that are completely under BSRE's control (e.g., increase the square footage by adding a few buildings or make existing ones wider). Further, even if it were impossible to add a few buildings or make existing ones wider (which it's not), as a precondition to making a claim that the minimum FAR requirement makes it necessary to have buildings taller than 90 feet, BSRE must first try to get out of having to comply with the minimum FAR requirement. It must exhaust all available administrative remedies. But it hasn't. For example, it could have, but didn't, apply for a variance to allow it to use the Code's current minimum FAR rules, which require far less density.

Because BSRE both failed to employ methods completely under its control to satisfy the minimum FAR requirement, and failed to exhaust administrative remedies by seeking relief from the minimum FAR requirement, BSRE's claim that buildings taller than 90 feet are necessary is without merit, and must be rejected.

III.

I offer the above comments hoping that they be be of some use to the County in preparing its reply brief for filing next month in the Court of Appeals.

Thank you.

Tom McCormick